INDEX

CITATIONS

786-473—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

BOSTON AND MAINE RAILROAD, PATRICK B. MCGINNIS, GEORGE F. GLACY, AND DANIEL A. BENSON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion of the district court (App. *infra*, pp. 17–18) is reported at 225 F. Supp. 577.

JURISDICTION

The decision of the district court dismissing Count I of the indictment was rendered on December 3, 1963 (App. *infra*, p. 17). On January 2, 1964, the United States filed a notice of appeal, and the district court has extended the time for docketing the appeal to July 1, 1964. Since the district court's order dismissing Count I was based solely upon the court's construction

of Section 10 of the Clayton Act, this Court has jurisdiction to review that order on direct appeal under the Criminal Appeals Act, 18 U.S.C. 3731. *United States* v. *Borden Co.*, 308 U.S. 188; *United States* v. *Healy*, 376 U.S. 75.

QUESTION PRESENTED

Section 10 of the Clayton Act prohibits a common carrier with officers who have "any substantial interest in" another corporation from commercial dealings with that corporation in an amount exceeding $50,000 annually, except on the basis of competitive bidding. The question presented is whether officials of a carrier who entered into an agreement and understanding with another firm under which they (1) arranged to have the carrier sell its equipment to such other firm for resale and (2) were to receive substantial monies from such firm, had a "substantial interest in" such firm.

STATUTE INVOLVED

Section 10 of the Clayton Act, 38 Stat. 734, 15 U.S.C. 20 provides:

> No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer,

or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. * * *

* * * * *

If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both, in the discretion of the court.

STATEMENT

Count I of a two-count indictment (R. 1–8), returned on August 13, 1963, charged the Boston and Maine Railroad and three of its officers (Patrick B. McGinnis, President and Director; George F. Glacy, Vice President; and Daniel A. Benson, Vice President) with violating Section 10 of the Clayton Act. That section requires that dealings between an interstate common carrier and another corporation in the amount of more than $50,000 in any one year be con-

ducted by competitive bidding "when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation * * *"

Count I alleges (R. 1–3) that, without competitive bidding, the B & M sold 8 stainless steel passenger coaches and 2 stainless steel combination baggage coaches valued in excess of $50,000 to the International Railway Equipment Corporation ("International"), and that the B & M "had upon its board of directors and as its president a person, and had as its selling officer and as its agent in the particular transaction a person, who at the same time had a substantial interest in" International. The B & M officers were named as defendants under a provision of Section 10 that makes every "director, agent, manager, or officer * * * who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation * * *" guilty of a misdemeanor.[1]

[1] Count II of the indictment, which is based upon the sale of the same equipment as Count I, charges defendants McGinnis, Glacy, Benson, International and Henry Mersey, President of International, with violating 18 U.S.C. 660. That section provides:

> Whoever, being a president, director, officer, or manager of * * * [a] corporation engaged in commerce as a common carrier, * * * embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of

The government filed a bill of particulars which stated that the substantial interest that McGinnis and Glacy had in International was an "understanding,

---

> the moneys, funds, credits, securities, property, or assets * * * or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

* * * * *

Count II alleges as follows (R. 3–6): About April 30, 1958, Waldo E. Bugbee, a dealer in used railroad equipment, attempted to obtain from B & M Vice President Glacy an option to purchase 10 B & M coaches then in service for resale to an undisclosed third party at a suggested purchase price of $500,000. Glacy refused to grant the option. McGinnis and Glacy instructed B & M officials that no direct dealings were to be had with Bugbee, and that Mersey, President of International, would handle the sale of the B & M coaches. Mersey then contacted Bugbee and indicated that he, Mersey, had the right to offer for sale the B & M equipment. Mersey negotiated the sale to Bugbee's intended customer, The Wabash Railroad, for his own account and at no time purported to act as an agent or broker for the B & M. Benson and Glacy recommended to the B & M board of directors that the 10 coaches be withdrawn from service and sold. As a director, McGinnis voted to approve the sale, and Glacy and Benson directed that the coaches be transferred to International at a price of $250,000. On August 14, 1958, title was conveyed by a bill of sale executed by Glacy on behalf of B & M in return for a check post-dated to August 22, 1958. On the next day, International resold the coaches to a Wabash subsidiary for $425,000. Within a short time after the transfer of the equipment, International paid McGinnis $35,000, Glacy $25,000 and Benson $11,500 from funds that were derived almost entirely from the proceeds of International's resale of the coaches to the Wabash.

The indictment also alleges that between July 1, 1958, and June 30, 1959, International's gross sales, which amounted to approximately $480,000, consisted almost exclusively of the resale of equipment acquired from B & M (R. 3).

agreement * * * and concert of action among the said defendants McGinnis, Glacy and International, and others, for * * * the purpose of producing profits for International from dealings by it in property acquired from the B & M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies" (R. 22). The defendants then moved to dismiss Count I, upon the ground that the bill of particulars did not show that McGinnis and Glacy had a "substantial interest" in International within the meaning of Section 10 of the Clayton Act (R. 22, 26, 28, 29).

On December 3, 1963, the court granted the motions to dismiss "on the basis of my construction of the statute." The court ruled that "the words 'any substantial interest' as used in the statute do not cover a situation such as here presented. The statute is limited to one who has a then present legal interest in the buying corporation and does not include one whose only interest is in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the Boston and Maine Railroad through the medium of International." (App. *infra*, p. 18.)

THE QUESTION IS SUBSTANTIAL

Section 10 of the Clayton Act prohibits any carrier from having any substantial business dealing with any firm, except through competitive bidding, when a director, the president, manager, purchasing or sell-

ing officer, or agent in the particular transaction, also is a director, or the manager, or purchasing or selling officer of, or "has any substantial interest in," such other firm. The question which this appeal presents is whether officers of a carrier who have entered into an agreement with another firm to sell the carrier's property to that firm for the purpose of enabling the latter to resell it at a profit with the understanding that they are to receive substantial monies thereby, have a "substantial interest" in the other firm within the meaning of that prohibition. We submit that, contrary to the ruling of the district court, such participation in "an illegal and illicit plan to siphon off for [their] personal benefit property of the Boston and Maine Railroad through the medium of International" (App. *infra*, p. 18), did give the B & M's officers a "substantial interest in" International.

1. Section 10 is designed to protect the nation's common carriers from the economic injury they might suffer if substantial purchases and sales were made without competitive bidding between the carriers and firms with which the carriers' officers and directors had interlocking relationships.[2] The federal interest

[2] In discussing a situation where the carrier was a purchaser, rather than a seller as in the present case, this Court stated: "The evident purpose of § 10 of the Clayton Act was to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest." *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 190.

has three aspects: (1) protecting the strength of the national transportation system; (2) maintaining the integrity of the assets and accounts upon which rate regulation rests; (3) preserving the system of free and fair competition among industries dealing with carriers. To these ends, the statute condemns four specific categories of interlocks which create a sufficiently serious conflict of interest on the part of the carrier's official so that he might favor his other firm at the expense of the carrier: where the carrier's official or director is a (1) director, (2) manager, or (3) purchasing or (4) selling officer of the firm with which the carrier is dealing. In addition, the Act has a fifth general category of proscribed relationships—where the carrier's official or director "has any substantial interest in" such other firm.

We submit that the latter broad phrase was intended to cover any other interlocking relationship besides the four specified that gives the carrier's official a sufficiently significant interest in the other firm as to cause divided loyalties on his part. It cannot properly be limited, as the district court ruled (App. *infra*, p. 18), to "a then present legal interest in the buying corporation."

Section 10 resulted from disclosures that unethical railroad officials had engaged in stock watering and had siphoned off the assets of railroads through the medium of contracts with supply and construction firms (See, *e.g.*, 51 Cong. Rec. 9182, 9185, 9261; S. Doc. No. 543, 63rd Cong., 2d Sess., pp. 29–30.). As passed by the House, the predecessor of Section 10 (which was

Section 9 of the House bill) contained a blanket prohibition upon any person who was a director or officer of a company engaged in, or himself engaged in, the business of selling equipment, materials or supplies to, or maintaining or constructing common carriers, or acting as underwriter of a carrier's securities, from acting as a director, officer or employee of any carrier to which his firm sold or for which it did such work. H.R. 15657, 63rd Cong., 2d Sess.; see H. Rep. No. 627, 63rd Cong., 2d Sess., pp. 17–18. The Senate substituted for the absolute prohibition on such transactions in the House bill a prohibition upon any person serving as a director, president, manager or purchasing officer or agent of any common carrier who was also an officer, director, manager or general agent of, "or who has any direct or indirect interest in," any firm from which the carrier made purchases or had any dealings in securities, railroad supplies or other articles of commerce amounting to more than $50,000 in any year, unless they were made through competitive bidding. S. Rep. No. 698, 63rd Cong., 2d Sess., pp. 63–65. The Senate Committee explained (*id.* at 47–48) that the "prime object" of the House provision is:

> to prevent common or interlocking directors in corporations which occupy the relations to each each other which are thus described; and is mainly intended to arrest the practice of the same persons occupying conflicting and incompatible relations in the corporate dealings of common carriers, often being practically both seller and purchaser * * * . While this evil is fully appreciated, the committee nevertheless

> recognize that, especially in the case of railroads, emergencies may arise when absolutely prohibitory law against such dealings would be most injurious to be public. * * * The Committee have, therefore, recommended a substitute for the House paragraph on this subject, which, with the publicity, competitive bidding and the supervision of the Interstate Commerce Commission provided for, will, it is believed, minimize if not wholly cure the evil to be reached.

In conference, the provision was shortened and simplified and the phrase "any direct or indirect interest in" was changed, without explanation, to its present wording of "any substantial interest in" (51 Cong. Rec. 15791).

While the major thrust of Section 10 was against interlocking relationships whereby the same individual served as a director or official of both the carrier and the firm with which it dealt, we think that by inserting the words "any substantial interest in" such other firm Congress intended also to reach another situation, namely, where a director or official of a common carrier, although not serving in a similar capacity in the other firm, had a financial relationship to that firm that was likely to lead him to favor it to the detriment of the carrier. In short, the phrase was intended to reach the kind of divided loyalties that give rise to a "conflict of interest," *i.e.*, where someone is "interested in" the other side of the transaction. Indeed, Senator Chilton, one of the conferees, described the prohibition in its application to the sale of carrier securities, as covering "anyone who at the same time

occupies a trust capacity or *is interested in* another corporation with which the dealings may be had" (51 Cong. Rec. 16003; emphasis added).[3]

This interpretation of the statute is, we believe, confirmed by the explanation of the conference bill which Senator Chilton gave on the floor of the Senate. He pointed out (51 Cong. Rec. 16002) that Section 10 "makes it impossible for officers of a common carrier to traffic and deal with those who conduct both sides of the transaction to the profit of individuals who may conduct the negotiations," and that its purpose was to enforce "honest, open methods * * * in purchasing and constructing by the common carriers. No honest management has anything to fear from this section, but it has a severe penalty that will deter the dishonest manipulator" (*id.* at 16003). He further explained (*id.* at 15943):

> It not only prevents corporations which are interlocked by officers and directors, but it says: "Or who has any substantial interest in such of them."
>
> The Senator will recall all we had before us, the ease by which interlocking directorates could be gotten around; in other words, you could have your son, or your cousin, or your lawyer, or your agent upon the corporation

[3] Contemporary writers similarly viewed the statutory provision as having such a comprehensive reach. They deemed it to require competitive bidding whenever the outside concern is one "in which any director or any of certain specified officers of the railroad is interested" (Durand, *The Trust Legislation of 1914*, 29 Quarterly Journal of Economics, 72, 89 (1915)), or in which such persons have "any direct or indirect interest in any other connection which may conflict therewith" (Ripley, *Railroads, Finance and Organization*, 454 (1915)).

> and accomplish the same thing as if you were on the board yourself.
>
> * * * * *
>
> * * * They cannot dodge it by having a supply company, and even though they have discarded the form of interlocking directors, if there be the interest of the railroad or the common carrier in the supply company, as the Senator chooses to call it, then it is prohibited.

In view of the Congressional intention "to arrest the practice of the same persons occupying conflicting and incompatible relations in the corporate dealings of common carriers" and to make it "impossible for officers of a common carrier to traffic and deal with those who conduct both sides of the transaction to the profit of individuals who may conduct the negotiations," it is hardly likely that Congress intended to require competitive bidding where the carrier's president is merely one of several directors of the firm with which it deals, but not to require such protection where he stands to receive substantial payments from the other firm as a result of its dealings with the carrier. The understanding which McGinnis and Glacy had with International was far more likely to influence them to favor International at the expense of the B & M than would be the case if one of them were merely a director of International but were not to receive any portion of its profits. In the latter situation, the statute would plainly apply; should the result be different where the danger of injury to the carrier is far greater? There is nothing in the broad words "*any* substantial interest in" (emphasis added) which requires such a conclusion.

and the basic aim of the statute points in the other direction.[4]

2. The indictment in this case, as amplified by the bill of particulars, alleged that the "substantial interest" which McGinnis and Glacy had in International "consisted of an understanding, agreement, relationship, arrangement and concert of action among * * * McGinnis, Glacy, and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B & M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies." As the district court held (App. *infra*, p. 18), the indictment charged "an illegal and illicit plan to siphon off for [their] personal benefit property of the Boston and Maine Railroad through the medium of International."

This understanding and agreement among McGinnis, Glacy and International gave the two individuals a "substantial interest in" the corporation. They undertook to arrange for International to acquire property from the B & M which International would

[4] The fact that another provision of the Clayton Act (Section 9, now 18 U.S.C. 660) made embezzlement, stealing, abstracting, willful misapplication or conversion by officers of a common carrier a felony, does not cast any doubt upon our argument. Section 10, as we construe it, does not duplicate Section 9. For it is designed to reach those interlocking relationships which, although not involving any embezzlement, stealing, etc., from the carrier, nevertheless pose a sufficient danger of divided loyalty to require that the transaction have the protection of competitive bidding.

then sell at a profit, and in return for which they were to receive "substantial monies," presumably out of the profits on such sales.[5] They could thus look forward to receiving a share of the profits which International expected to make in its dealing in the B & M property which they procured for it. This expectation of sharing in such profits obviously had a significant influence upon their judgment when, in their capacity as B & M officials, they decided to sell the carrier's property to International. It was a real and practical expectation which they could count on, and which in fact International honored. This expectation constituted a "substantial interest in" International within the meaning of Section 10.

This conclusion is supported by this Court's decision in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520. The major question in that case was whether the activities of Wensell on behalf of the United States in connection with the negotiation of a contract between it and the Generating Company for the construction of a power plant violated the federal conflict-of-interest statute, 18 U.S.C. 434. That statute makes it unlawful for anyone who, "being an of-

[5] The actual operation of this scheme, so far as it involved the sale of the ten cars involved in this case, is set forth in Count II of the indictment. That count alleged that after the B & M had rejected a proposal to grant a dealer an option to purchase the cars for resale at $500,000, the President of International negotiated their sale to the dealer's customer. The B & M turned the cars over to International for $250,000; the following day International resold them for $425,000; shortly thereafter International paid McGinnis $35,000, Glacy $25,000 and Benson $11,500, with funds that were derived almost entirely from the sale of the cars. See *note 1*, *supra*, pp. 4–5.

ficer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation * * * or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity * * *." Wenzell acted as a special consultant to the United States in preliminary negotiations with the Generating Company; at the same time, he was a vice-president and director of the First Boston Company, one of the country's major financial institutions and investment bankers. The Court held that Wenzell, because of his connection with First Boston, was "directly or indirectly interested in the pecuniary profits or contracts" of the Generating Company, since "if a contract between the Government and the sponsors was ultimately agreed upon, there was a substantial probability that, because of its prior experience in the area of private power financing, First Boston would be hired to secure the financing for the proposed Memphis project" (364 U.S. at 555). Thus, as an officer and director of First Boston, Wenzell "could expect to benefit from any agreement that might be made between the Government and the sponsors" (*ibid.*), and that expectation was sufficient to bring him within the coverage of the statute. Cf., also, *Securities and Exchange Commission* v. *Dumaine,* 218 F. 2d 308 (C.A. 1); *Adams* v. *United States,* 302 F. 2d 307 (C.A. 5).

Of course, the *Mississippi Valley* case involved a different statute. But its significant point for this case is the Court's recognition that Wenzell's expectation of profits from his affiliation with First Boston

if the contract were entered into gave him the kind of interest in the contract which "made it difficult for him to represent the Government with the singleness of purpose required by the statute" (364 U.S. at 559). By the same reasoning, we submit that McGinnis and Glacy's expectation, based upon an agreement, to receive a share of the profits which International would make on its dealings in the B & M property, gave them a "substantial interest in" International. Indeed, their interest was more substantial than Wenzell's. For when Wenzell was representing the United States, it was far from certain that First Boston would ever receive any compensation from the Mississippi Valley Generating proposal. But when McGinnis and Glacy sold B & M property to International at a price which would enable the latter to resell it immediately at a substantial profit (see note 1, *supra*, pp. 4–5), there was no uncertainty that they would receive substantial monies therefrom.

CONCLUSION

This appeal presents a substantial question of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ROBERT B. HUMMEL,
I. DANIEL STEWART, JR.,
Attorneys.

JULY 1964.

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Criminal Action No. 63–252–S

UNITED STATES OF AMERICA, PLAINTIFF

v.

BOSTON AND MAINE RAILROAD, ET AL., DEFENDANTS

MEMORANDUM

December 3, 1963

SWEENEY, Ch. J. There are before me motions of the defendants Boston and Maine Railroad, Daniel A. Benson, Patrick B. McGinnis and George F. Glacy to dismiss Count I of the indictment in the above case in the light of a Bill of Particulars filed by the government. In this Count of the indictment the defendants are charged with violation of Section 10 of the Clayton Act (15 U.S.C. 20) which provides "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce * * * with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, * * *" except by competitive bidding.

The government concedes that there are no interlocking directors, and it bases its case upon the allegation that the named individual defendants had a "substantial interest" in the defendant International. The Bill of Particulars discloses that the "substantial interest" in this case consists of "an understanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy, and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B&M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies."

The motions to dismiss Count I of the indictment are allowed on the basis of my construction of the statute. I rule as a matter of law that the words "any substantial interest" as used in the statute do not cover a situation such as here presented. The statute is limited to one who has a then present legal interest in the buying corporation and does not include one whose only interest is in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the Boston and Maine Railroad through the medium of International.

U.S. GOVERNMENT PRINTING OFFICE: 1964